

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

Case No: 07-4767

UNITED STATES OF AMERICA

v.

CYRIL H. WECHT

WPXI, Inc;  
TRIBUNE-REVIEW PUBLISHING COMPANY;  
PG PUBLISHING COMPANY  
d/b/a Pittsburgh Post-Gazette,

Appellants

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On Appeal from the United States District Court  
for the Western District of Pennsylvania  
District Judge: The Honorable Arthur J. Schwab  
District Court No. 06-CR-26

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Submitted Pursuant to Third Circuit L.A.R. 34.1(a)  
January 8, 2008

Before: SMITH, FISHER, and VAN ANTWERPEN, *Circuit Judges*

(Filed: January 9, 2008)

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ORDER

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WPXI, Inc., PG Publishing Company, doing business as The Pittsburgh Post-Gazette, and Tribune-Review Publishing Co., Intervenor-Appellants, have filed The

Media's Emergency Motion For Summary Reversal of the District Court's Order Dated December 21, 2007, or, in the alternative, Expedited Relief in the Form of a Stay of Jury Selection and Trial Proceedings Pending Disposition of this Appeal. Jury selection in the underlying prosecution of United States v. Cyril Wecht is scheduled to commence on Thursday, January 10, 2008. In the motion, the Media Intervenor-Appellants request that we summarily reverse, pursuant to I.O.P. 10.6, the District Court's order directing the empanelment of an anonymous trial jury. They also request that in-person voir dire be conducted in open court and not exclusively through use of a written questionnaire, which would be available only to counsel for both the Government and the defense during the jury selection process.<sup>1</sup> The Government opposes both the request for summary reversal and the alternative request for a stay. Counsel for defendant Wecht has joined in the Media Intervenor-Appellants' claims, arguing that "[t]here is no conflict here between Dr. Wecht's fair trial rights and the First Amendment rights being protected by the media." By order dated January 2, 2008, the motions panel referred the instant motion to a merits panel.

Media Intervenor-Appellants present a right of access claim under *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Appellate jurisdiction exists under the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541

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<sup>1</sup>The Media Intervenor-Appellants state in their motion that they are not seeking access to the jurors' home addresses or the actual jury questionnaire.

(1949).

The District Court's December 21, 2007, order is entitled "Order Of Court Re: Jury Selection, Voir Dire, And Other Pretrial Issues." That order, *inter alia*, directs an anonymous jury (or, as the District Court refers to it, an "innominate" jury) and prescribes a multi-stage process of jury selection that preserves the anonymity of all prospective jurors who participate in the voir dire process.

To the extent that the District Court's order restricts access of Media Intervenor-Appellants and defense counsel to the names of prospective jurors who participate in the selection process prescribed by the District Court, those provisions of the order are VACATED. We leave to the discretion of the District Court the method and timing of disclosure of juror and prospective jurors' names, except that disclosure of those names shall be made prior to the swearing and empanelment of that jury.

To the extent that the Media Intervenor-Appellants request any other relief relative to the conduct of voir dire before the District Court, their motion is DENIED. The motion for a stay is DISMISSED as moot.

A supporting opinion shall follow in due course.

The mandate shall issue forthwith.

Judge Van Antwerpen would have vacated the District Judge's order, but permitted him to keep the names and addresses of those prospective jurors selected as trial jurors confidential until the end of the case at which point the jurors' names would be made

public. Judge Van Antwerpen will issue a dissenting opinion at the time the majority opinion is issued. As Judge Van Antwerpen has not joined in this order, he sets forth his analysis below.

BY THE COURT:

/s/ D. Brooks Smith  
D. Brooks Smith

VAN ANTWERPEN, Circuit Judge, *Sur Order Vacating District Court's Order Dated December 21, 2007*

Judge Van Antwerpen dissents from the order of the majority for reasons that may be outlined as follows. With regard to the rights of defendant Wecht, the July 13, 2006 order of the Board of Judges and the District Judge's proposed voir dire process for this case should be modified to disclose more information. The parties should be given and keep confidential the names and addresses of all prospective jurors. During voir dire the court should give the media and public the names of any of the 400 prospective jurors who are not selected for trial. The media and public may of course be present in court during voir dire and the trial, and in most cases, they would be entitled to the names and addresses of those jurors selected to be trial jurors. Nevertheless, in withholding juror information, we must be "particularly deferential" to the trial judge, who is familiar with the "local ambience." *United States v. Scarfo*, 850 F.3d 1015, 1023 (3d Cir. 1988).

Defendant Wecht is a highly controversial individual and his testimony has led to the conviction of many individuals. As set forth on pages 21-30 of his opinion, the findings and order of the trial judge concerning the relentless media attention, trial length, known enemies of defendant Wecht, and potential for juror intimidation in this marathon case are sufficiently compelling and narrowly tailored to allow the names and addresses of the trial jurors to be withheld from the media. The trial jurors' names should be given to the media and public as soon as the trial is over. The trial judge chose this course rather than sequestering the jury for a lengthy period of time.

As to the media, far too many issues raised by them are in dispute to grant summary remand under our I.O.P.10.6. Furthermore, the media delayed coming to this court until the eve of trial and this should not excuse a failure to first seek a stay from the District Judge as required by our jurisprudence and Fed. R. App. P. 8(a)(1)(A). In particular, the District Judge is familiar with this case and should be given an opportunity to make expedited findings about (1) the likelihood of success on the merits; (2) irreparable harm to the moving parties; (3) whether the stay will substantially injure other interested parties; and (4) whether the public interest is served.

Assuming the foregoing modifications are made to the trial court's order, the media has not made the requisite strong showing of likelihood of success on the merits by demonstrating that the First Amendment requires disclosure of the trial jurors' names during the trial. In fact, Congress expressly provided that a District Court Judge may

keep juror names confidential “in any case where the interests of justice so require.” 28 U.S.C. § 1863(b)(7). Case law supports the discretion of the trial judge in this case. *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306, 103 S. Ct. 3524, 3527 (1983) (“the State’s interest [] in shielding jurors from pressure during the course of the trial . . . becomes attenuated after [the verdict]”); *United States v. Antar*, 38 F.3d 1348, 1362 (3d Cir. 1994) (“Stronger reasons to withhold juror names and addresses will often exist *during* a trial than *after* a verdict” (quoting *In re Globe Newspaper Co.*, 920 F.2d 88, 91 (1st Cir. 1990))); *ABC, Inc. v. Stewart*, 360 F.3d 90, 104 (2d Cir. 2004) (advocating concealing the identities of prospective jurors during *voir dire*); *United States v. Black*, 483 F. Supp. 2d 618, 620 (N.D. Ill. 2007) (denying the media’s request to release the names of the jurors during the pendency of the trial); *In re Indianapolis Newspapers, Inc.*, 837 F. Supp. 956, 957 (S.D. Ind. 1992) (“policy of this Court not to disclose to persons, other than the parties to a particular litigation, the names and addresses of a jury panel until after that panel has completed its term of service”); *United States v. Doherty*, 675 F. Supp. 719, 722 n.4 (D. Mass. 1987) (“The right of the Court to protect the anonymity of the jury through trial, deliberations, and verdict appears undoubted”).